

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRUCE BARTLEY

Claimant

VS.

INTERNATIONAL PAPER COMPANY

Respondent

Self-Insured

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Docket No. 160,520

ORDER

On the 31st day of May, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on April 20, 1994, came on for oral argument. A decision was rendered by the Appeals Board on July 11, 1994. The matter was then appealed to the Kansas Court of Appeals in Docket No. 72,388. The Court of Appeals remanded this matter, finding that the decision had been rendered by a Board found to be unconstitutional in Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995). The Court's Order of Remand required reconsideration of this matter by the "new" Board. The following is the Order of the "new" Board.

APPEARANCES

The claimant appeared by and through his attorney, William L. Phalen of Pittsburg, Kansas. The respondent, a qualified self insured, appeared by and through its attorney, John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Did claimant meet with personal injury by accident arising out of and in the course of his employment with respondent by a series of accidents to his right elbow and shoulder from July 1, 1991, through November 15, 1991?

(2) What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1)(2) Claimant is awarded a seven percent (7%) permanent impairment of function of the right middle finger as a result of an injury occurring on or about June 26, 1991 but is denied compensation for an alleged injury to his right elbow and shoulder with an alleged accident date of July 1, 1991, through November 15, 1991.

Claimant, a maintenance person for respondent, jammed his right middle finger against a metal platform on June 26, 1991. Claimant informed his supervisor and was transported to the hospital emergency room where x-rays were taken. Claimant was provided no treatment but was told not to use the finger if possible. Claimant returned to work for the respondent on the same day. Claimant alleged the injury to his finger caused him to alter the use of his hand thus leading to injuries to his elbow and shoulder. The medical providers who administered treatment to the claimant subsequent to the date of injury were not deposed in this matter.

Claimant was examined by Dr. Dale Darnell, a board-certified orthopedic surgeon at the request of the respondent. Dr. Darnell diagnosed claimant as having a jammed finger which he described as being similar to when a ballplayer jams his finger. The claimant did advise Dr. Darnell of complaints to his elbow and shoulder and indicated that this physical impairment was interfering with his ability to bow hunt as he could not properly draw his bow. Dr. Darnell found claimant to have a full range of motion in his shoulder with some pain and a tender posterior rotator cuff. There were no other findings. The range of motion in the elbow was full with no tenderness but there were complaints of pain at the tip of the olecranon process which is the bony point of the elbow. X-rays confirmed an osteophyte in that location and also early sclerosis. The claimant was rated at three to seven percent (3-7%) functional impairment to the right middle finger based upon subjective complaints. Dr. Darnell found no impairment to the elbow or shoulder. Dr. Darnell felt claimant had early tennis elbow and rotator cuff tendinitis although he opined the elbow complaints were poorly localized. He admitted the claimant's pain was chronic as it had lasted more than six months but did not feel the elbow or the shoulder were related to the finger injury suffered by the claimant in June of 1991.

Claimant was examined by Dr. Edward Prostic, a board-certified orthopedic surgeon, at the request of claimant's attorney, on May 12, 1992. Dr. Prostic examined the finger and was informed of the elbow and shoulder problems. He found intermittent crepitus and mild weakness with external rotation in the shoulder. He further diagnosed impingement syndrome of the shoulder with chronic tendinitis of the rotator cuff. X-rays of the shoulder showed early degeneration of the acromioclavicular joint and sclerosis of the greater tuberosity which is an irritation of the rotator cuff. He indicated both the elbow and shoulder problems were chronic. He found osteoarthritis in the elbow to be long standing and clearly existed before the date of injury. He was unable to say within a reasonable degree of medical probability whether the shoulder degeneration pre-existed the date of accident but did agree that it was a degenerative arthritic process.

Medical records placed into evidence indicate the first time claimant complained of problems with the elbow and shoulder was on August 19, 1991, when he saw Dr. Odgers. There were no complaints to the elbow or shoulder prior to that time. Claimant had earlier informed Dr. Prostic that he had hurt the elbow and shoulder on the date of injury, information which was not supported by the medical evidence.

Dr. Prostic was unable to say if the claimant's impairment predated the date of accident and also did not know whether a single accident caused the elbow and shoulder injuries or whether the problems were from a different cause.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Dr. Darnell finds claimant to have problems in his elbow and shoulder but does not relate these problems to claimant's injury of June 26, 1991. Dr. Prostic attempts to relate the elbow and shoulder problems to claimant's injury but fails to say within a reasonable degree of medical probability as to the specific causal factors of the elbow and shoulder problems. The Appeals Board is not persuaded by a preponderance of the credible evidence that claimant suffered an injury arising out of and in the course of his employment to his elbow and shoulder on June 26, 1991, while working for respondent. The Appeals Board does believe claimant suffered an injury resulting in a permanent impairment to his right middle finger. The medical evidence of Dr. Darnell is persuasive and claimant is awarded a seven percent (7%) permanent impairment of function to the right middle finger on a scheduled basis.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award of the Special Administrative Law Judge William F. Morrissey dated April 20, 1994, shall be and is affirmed in all respects and the claimant, Bruce Bartley, shall be and is awarded compensation against the respondent, International Paper Company, a qualified self-insured.

Claimant is entitled to 2.1 weeks of permanent partial disability at the rate of \$278.00 per week in the total sum of \$583.80. As of June 30, 1994, the entire sum shall be due and owing in one lump sum less any amounts previously paid.

Claimant is further awarded unauthorized medical up to \$350.00 upon presentation of an itemized statement.

Claimant's contract for attorneys fees is hereby approved subsequent to provisions of K.S.A. 44-536. Fees and expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and the insurance to be paid as follows:

William F. Morrissey
Special Administrative Law Judge

\$150.00

Martin D. Delmont, C.S.R. Transcript of Regular Hearing	\$ 57.25
Patricia K. Smith, C.S.R. Deposition of Bruce Bartley	\$142.15
Hostetler & Associates Deposition of Edward J. Prostic, M.D.	\$152.80
Deposition of Dale Darnell, M.D.	\$176.05

IT IS SO ORDERED.

Dated this _____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William L. Phalen, Natl Bank Building, Suite 302, Pittsburg, Kansas 66762
John I. O'Connor, PO Box 1236, Pittsburg, Kansas 66762
William F. Morrissey, Special Administrative Law Judge
Philip Harness, Director